Journalism and Defamation Law: Contesting Public Speech

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Abstract
This paper begins from an understanding of public speech as diverse or combative in its views and genres, and as being facilitated, in part at least, by media. Much speech of public value criticises, and critical speech can raise concerns about potential legal liability in defamation. With substantial differences between US and Australian defamation law, academic commentary has long suggested that the more stringent Australian law ‘chills’ publications. This paper reports from a multi-year study into defamation law and media production practices. Drawing from legal analysis and interviews with media practitioners, the paper compares how Australian and US defamation laws conceptualise public speech. It contrasts the breadth and strength of protection for publications under US and Australian law to explain the potential space for speech that is left under each approach. The differing legal conceptions of public speech in US and Australian defamation law and practice are explored in light of the understandings and aims of key actors in news production. This provides a useful path into understanding the challenging legal position facing much media speech.

Key words
Defamation law, public speech, journalism, Australia, US
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Introduction

In analysing journalist and media practice in contemporary democratic societies, key debates exist around the extent to which media provide a space for public speech and debate. Our contention in this paper is that to explore the extent to which media does provide such a space requires an analysis of the institutional context within which media is located (Benson and Neveu 2005; Cottle 2003). This context involves many elements, including law. In analysing the relationship between journalism practice, law and public speech, our starting point is the claim that public speech can be diverse and potentially combative, and that much speech of public value is critical of organisations and individuals. Legal challenges can then arise; critical speech raises concerns about potential legal liability. Particularly notable here is defamation law, which is the focus of our paper.

Drawing on a multi-year study into journalism and defamation law, we aim to work towards a more developed understanding of how Australian and US defamation laws conceptualise public speech. We argue that exploring this through the reflections of key actors in news production provides an important path into understanding the challenging legal position facing much media speech.

Public speech and law

Commonly, three or four rationales are provided within law for protecting speech, namely that speech is said to further a search for truth, further the operation of democracy, and further the development of autonomous subjects. Especially in the
US, these three justifications often intersect with a fourth: distrust of government action where it is seen to regulate speech (Barendt 2005).

Law maintains these rationales as resources to deploy when arguing about and making decisions on laws affecting speech. However, such approaches can downplay the contesting quality of much public speech. They can easily slide into a relatively unreflective presumption that public speech resembles a conversation involving spontaneous and open feedback, which is subject to egalitarian rules of engagement and aimed at consensus formation. At least some public speech may be better thought of differently: to address a public is a particular kind of world-making project, and such speech creates divergent and plural publics, highlighting questions of power (Warner 2002).

We begin from a somewhat wider concept of speech than is traditionally held in law, arguing that it may be about different forms of contest as much as agreement. So added to conceptions of speech for truth, democracy, autonomy, or distrust of government, is speech for the creation of diverse publics. It is in this context that we analyse defamation law in Australia and the US, to explore the conceptions of speech that exist in those jurisdictions.

**Public speech and defamation law**

*Australian Defamation Law*

A traditional Commonwealth approach to defamation law requires the plaintiff to prove three things (Kenyon 2006). First, that the defendant published material.
Second, the material must identify the plaintiff. Third, the plaintiff must prove the material conveys a defamatory meaning, that is, it would harm the plaintiff’s reputation and would make ordinary people think less of the plaintiff. As developed by the courts, this means that almost anything that is critical, including opinion as well as factual statements, which is published by a media outlet will meet the test of defamatory.

Once the three elements of publication, identification, and defamatory meaning are established, the statement’s publisher will be liable unless it can establish a defence. Apart from fair reports of courts and parliaments, the main defences for the media have required it to prove that a publication is true, or that it is an honest opinion, but for traditional defamation law that means an opinion based on facts that are proven to be true. For both defences of truth and honest opinion, establishing the truth underlying the publication is a key requirement. Thus, many media defendants will be liable in jurisdictions like Australia, if they cannot prove the publication true by evidence that is admissible in court.

In short, traditional law conceives of a space for public, critical speech only where that speech can be proven true in court. It is important to note, however, that Australian law has changed with the development of a defence for ‘reasonable’ publication. Since 1994, a series of constitutional cases remodelled Australian defamation law, leading to what is called the *Lange* qualified privilege defence (*Lange v Australian Broadcasting Corporation* 1997). More recently, from 2006, uniform defamation statutes have been introduced in all Australian states and territories. While the uniform legislation leaves in place the general model described,
it provides a new defence for publications that cannot be proven true, if the publication concerns what judges think of as a matter of proper public concern and the circumstances of publication were ‘reasonable’. As yet, there are not substantive case law determinations about the defence. While the emergence of a reasonable publication defence suggests the law may be moving towards a broader understanding of legally allowable speech, the history of some analogous defences suggests the courts may well apply these tests so that it is very hard for the media to succeed in showing ‘reasonable’ publication (Chesterman 2000).

US Defamation Law

The traditional law model outlined above was, in broad terms, also the US position until the 1964 Supreme Court decision of *New York Times v Sullivan* (New York Times v Sullivan 1964; see also, Lewis 1991; Smolla 1997). Under the *Sullivan* rules, it is more difficult to sue than under the traditional law. Plaintiffs who are public officials or public figures must prove the three elements mentioned above, but these plaintiffs must also establish that the defendant published with ‘actual malice’ (New York Times v Sullivan 1964: 279-80). This entails proving the publication conveys factual material (rather than opinion) that is false, and which the publisher believed to be false when it was published. The plaintiff must prove the publisher actually knew the material was false, or at least had a ‘high degree of awareness’ of its ‘probable falsity’ and recklessly disregarded that danger (St Amant v Thompson 1968). In addition, the plaintiff must establish ‘actual malice’ with ‘convincing clarity’, which is a standard of proof substantially higher than the usual standard in civil litigation of the balance of probabilities (New York Times v Sullivan 1964: 254, 270).
The US law suggests public speech in media can criticise public figures without liability for defamation, so long as the speaker does not know that the publication is false. The Sullivan rules support what the Supreme Court has called the country’s ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open’ (New York Times v Sullivan 1964: 270). This is quite a different legal conception of a space for public speech than exists in the Australian context, suggesting a greater possibility for media to engage in diverse speech.

But, do the very different Australia and US laws influence the work of journalists in their everyday practice? This is the question that the remainder of the paper addresses.

**Methods**

This paper is based on a multi-year study into defamation law and media content production, centred on news, current affairs and commentary. The project involved more than 170 semi-structured interviews with journalists, editors and managers within media and with lawyers working in media companies or private practice in the US, UK and Australia. For this paper, our focus is on approximately 90 interviews conducted with journalists, editors, managers and lawyers in Australia and the US in the period 2002-2005. The interviews focused on participants’ perceptions and experiences of news production generally, of defamation litigation, and of the relationship between media content production and defamation law more specifically. Interviews also examined interactions between journalists, editors and lawyers, how the interactions were perceived and their influence on production practices. Transcripts were coded thematically. All participants were assigned a number,
indicated in this paper in brackets at the end of quotes, as part of the process of protecting confidentiality.

**Interviews**

While many issues arose through the interviews, here we focus on journalists’ understandings of truth, evidence, and their perceptions of the impact of defamation law on journalistic practice, which related to larger issues, outlined above, about the law’s view of public speech.

**Truth**

A legally resonant aspect of the interviews concerned how journalists saw the question of what they are warranted to publish. In part, this could be seen as a question of truth, but it is not the truth arrived at in court: the particular and limited version of truth that can be established by evidence in a juridical process. The journalists we interviewed were not so much concerned with ‘truth’ as with ‘fair truth’. As one Australian journalist noted:

[Truth is] a multilayered question, because one person’s truth is another person’s rubbish…I constantly get stories coming in front of me that reporters believe are true. And they are, but they’re not fully true, they’re half the truth. They don’t have the proper context, so yeah, truth is obviously what we’re aiming for, but it’s also got to be fair truth…I think probably context is [the] most important word for me. [36, Australia]

As an experienced US freelance journalist said:
[Y]ou seek any sort of document to help establish the truth when you are criticising someone, and you owe it to that party to give him or her or it a chance to rebut the charges, and that’s fair journalism, practising fair journalism. [254, US]

In trying to verify defamatory material that might be published, as part of the process of arriving at fair truth, journalists recognised the contested nature of claims to truth. As a US respondent with extensive investigative experience said:

I think that journalists are a little more cautious [now] about a term like ‘the truth’...[T]ruth is a relative term...[W]e’re living in a very diverse society [and]...how it looks to you...may depend on where you sit...where you live, and to what group you belong. So I think there’s probably more caution in that regard...although I think the best journalists are still trying to get the most empirically valid and reliable array of facts and opinions that they can about a particular topic. [244, US]

This approach would still expose publishers to legal liability under traditional law, and will do so under current Australian law unless ‘reasonable’ publication is treated robustly by courts. Immediately, we see the emergence of a disjuncture between journalistic and traditional legal understandings of truth, impacting on what speech can be reported in the media without running the risk of legal liability in defamation law.
Evidence

It is also important to consider what evidence was wanted in the search for ‘fair truth’.

In short, journalists, editors and their lawyers wanted documents and people:

Documentation, pure documentation [is ideal]. But there are occasions where you have a source and you have full faith in that source where you can go to the editor and you can say ‘this is the story, there is nothing in writing, my source won’t put anything in writing but I tell you I trust the source’. [6, Australia]

The sense from journalists was that great efforts were made to satisfy themselves about the publications in question. Interviewees, however, recognised that law’s standards as to ‘truth’ were different, and that proving truth in court was a difficult matter. An assistant editor said:

[L]awyers see these things from one direction, we see them from another. Most people who become journalists want to crusade for justice, right? That gets knocked out of you in your first five years and you realise that it’s not … as simple as that, it’s about fairness, OK? [36, Australia]

Journalists discussed the process of seeking to verify material at some length:

I think you’ve got to be able to prove that all reasonable efforts were [made]…A lot of them are just basic, but people have to have a right of reply…And not just two paragraphs if they spoke for an hour. There has to be a balance and a weighting in a story…that’s just basic rules of engagement. If people can’t be
contacted…genuinely…you’ve got to give them the benefit of the doubt. When in doubt, leave out, err on the side of caution …I accept all that, but…there has to be a public interest test [or public interest approach by the law]…[I]f you’ve made…reasonable efforts to contact another party…to check the facts…to put the facts to them…there has to be some latitude afforded to the person who has acted responsibly. [37, Australia]

A newspaper business editor in the US emphasised a process of ‘reasonable’ investigation:

Well, if it’s something that’s going to be controversial…I want original documents…if there’s any documentation that backs it up…I make sure the reporter has it. I want to make sure the reporter is quoting something, that he or she has actually read the document…[Then] all parties have been contacted…I’ve done a lot of investigative reporting and often you have sources [ie subject of stories], they don’t want to talk to you because they know the story’s going to be negative and we have to make every effort to get their side [255, US]

Two differences with regard to evidence and verification were notable in the US. One difference was the greater degree to which documents were referred to, linked to the far greater accessibility of many public records in the US. A second difference concerned the degree to which the reputation of the speaker—the journalist and media outlet—was seen as linked with the accuracy of publications. While US law may not require proof of truth in the same manner as has been traditional in Australia, US
media is very concerned about not publishing falsities, with this concern being very closely linked to the professional status and reputation of the journalist and organisation.

Perceptions of impact of defamation law on media

Bringing these reflections about the interaction between law and media speech together, several participants commented on the perceived impact of defamation law. Here, the material indicates that, relative to the US, Australian speech is chilled, particularly in relation to investigative reporting and criticising business, which is consistent with existing study of media content (Dent and Kenyon 2004). A respondent in Australia commented:

> [E]ven things that you know to be true or appear to be true, from the best of your knowledge…a lot of stuff has to be curtailed…I can think of dozens of…examples where…official reports came out six months later and fairly much matched what we’d had six months earlier, but we couldn’t publish it because we had no protection. [37, Australia]

An experienced investigative reporter commented:

> One of the big areas that we’re not covering properly in Australia these days, is business. And probably the best example is dodgy insurance companies. I and others throughout the nineties, were getting tips about [companies that later collapsed]…And essentially the weaknesses in corporate disclosure laws, the weaknesses in terms of statutory obligation to auditors, the weaknesses in
terms of the media’s understanding of business, meant that we just couldn’t get the evidence to satisfy what we knew was a real, looming concern in the insurance industry. [47, Australia]

The situation was markedly different in the US, where interviewees did not recognise any substantial impact from US defamation law. For example:

[I]f a good story came up I have never heard of anyone saying, ‘oh we have to be careful because he’s litigious or maybe we shouldn’t do it’. [203, US]

What influence does defamation law have on the newspaper’s content? None. We operate on the premise that certain stories pose legal concerns, and that we can resolve those by consulting a lawyer, but the origin of the story is in the journalistic interest. [261, US]

In the US, journalism—within the constraints of resources, marketing and so forth—drives stories rather than defamation law.

**Conclusions**

Three key conclusions emerge about the relationship between defamation law, the media, and public speech. First, interviews suggest that Australian law chills political and especially corporate-related speech, relative to the US. Second, the relative availability of evidence, especially the public availability of documents which is greater in the US, is a significant factor in allowing investigations to occur, and to be published. It is relevant to allay legal concerns about potential defamation liability, in
particular in the context of establishing the truth. But it is also important for journalists’ own standards of verification. Finally, the legal models of public speech in Australia and the US appear to be far apart. For media speech in Australia, only the ‘reasonable’, and perhaps often in practice only what can be proven true in court, is legally safe to add to public debate. Seeking to say what one believes as opinion, or believes to be true, is not enough.

Together these conclusions underline the importance of analysing the institutional context, in this case the law, if we are to understand whether, and how, journalism contributes to public debate. The conclusions also point to the value of comparative research in this field, as one means of exploring how differences in law may have different influences on media practice. In this case, the US legal model of media speech, when compared to Australia, does appear closer to a model that imagines speech as diverse, contesting and challenging.

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